1990

Estate Landscape and Snow Removal Specialists, Inc. v. The Mountain States Telephone and Telegraph Company : Petition for Writ of Certiorari

Utah Supreme Court

BRIEF

IN THE UTAH SUPREME COURT

ESTATE LANDSCAPE AND SNOW REMOVAL SPECIALISTS, INC.,	:	
Plaintiff and Respondent,	:	Court of Appeals Case No. 880428-CA
vs.	:	Argument Priority No. 14b
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	:	
Defendant and Appellant.	:	900312

PETITION FOR WRIT OF CERTIORARI

Appeal from a judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, The Honorable Timothy R. Hanson, District Court Judge, presiding.

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QUESTIONS PRESENTED FOR REVIEW

1. When a check is tendered on condition that negotiation of it will constitute full satisfaction of an unliquidated claim, does the negotiation of the check with knowledge of the condition create an accord and satisfaction, even though the payee does not subjectively intend to assent to the condition?

2. Does the Court of Appeals opinion conflict with the decision of the Utah Supreme Court in Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985)?

3. Does the Court of Appeals opinion conflict with the decision of another panel of the Court of Appeals, in Cove View Excavating and Construction Co. v. Flynn, 758 P.2d 474 (Utah App. 1988)?

4. Does the Court of Appeals decision so far depart from the accepted and usual course of judicial proceedings, or does it so far sanction such a departure by the trial court, as to call for an exercise of this Court's power of supervision?

REFERENCE TO REPORT OF THE OPINION OF THE COURT OF APPEALS

The Court of Appeals opinion is reported at 1990 WL 69055.[1]

STATEMENT OF JURISDICTION OF THE UTAH SUPREME COURT

The Court of Appeals filed its opinion May 24, 1990. No petition for rehearing was filed, nor was any order entered extending the time for filing a petition for writ of certiorari.

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[1] This Petition will refer to the slip opinion of the Court of Appeals, attached as Appendix A.

The Utah Supreme Court has jurisdiction to review the decision of the Court of Appeals under the authority of Utah Code Ann. Sections 78-2-2(3)(a) and 78-2-2(5), and Rules 42-48 of the Rules of the Utah Supreme Court.

CONTROLLING PROVISIONS OF STATUTES, ETC.

There are no controlling provisions of constitutions, statutes, ordinances, or regulations in this case.

STATEMENT OF THE CASE

1. Nature of the Case

This is a civil action for collection of money for snow removal services rendered under a written contract.

2. Course of the Proceedings

Estate Landscape and Snow Removal, Inc. ("Estate") filed its complaint on August 8, 1985, praying for damages of $30,162.50 (R. 2). Estate filed an Amended Complaint on May 16, 1986, praying for damages of $21,549.50 (R. 24). On July 31, 1986, The Mountain States Telephone & Telegraph Company ("Mountain Bell") filed a motion for summary judgment based on the affirmative defense of accord and satisfaction (R. 45), which the Court (Judge Michael Murphy presiding) denied in a Summary Decision and Order filed December 29, 1986 (R. 127). The case was tried to the Court (Judge Timothy Hanson presiding) on January 12 and 13, 1988.

3. Disposition in the Lower Courts

On April 1, 1988, the trial court entered judgment for Estate. Mountain Bell appealed to the Court of Appeals. On May

24, 1990, the Court of Appeals affirmed the judgment for the principal, but remanded for amendment of the judgment to exclude compounded interest.

4. Statement of Relevant Facts

Estate and Mountain Bell entered into a written agreement wherein Estate agreed to perform snow removal services for Mountain Bell at specified rates, including the removal of snow at Mountain Bell's central office in Alta, Utah "when the snow reaches four inches." (Exhibit 3)

Between December 28, 1984 and April 1, 1985, Estate performed snow removal services at Mountain Bell's Alta office. At the close of the snow season, Estate sent Mountain Bell an itemized final bill for $30,162.50, representing services rendered at the Alta site during that period. (Exhibit 4) Mountain Bell disputed the bill as excessive, principally because it contained charges for snow removal on days when less than four inches of snowfall was reported.[2] On about June 14, 1985, Mountain Bell prepared a letter to Estate detailing the portions of the bill that it disputed.[3] (Exhibit 6) The letter concluded:

> Based on the above identified billing descrepancies [sic] we have enclosed a check for $8613.00 which is payment in full for satisfaction of contracted services. <u>If you are not willing to accept that sum, $8613.00 in full satisfaction of</u>

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[2] Tripp Transcript of Jan. 13 at 37-43. Because there were several reporters at various times during the trial, the transcript is not paginated consecutively. Therefore, it will be referred to in this Petition by date, and where necessary, by the name of the reporter.

[3] Tripp Transcript of Jan. 13 at 42-44.

the sums due, DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid.

(emphasis in original)

Mountain Bell's bill payment supervisor held the letter pending delivery of a check for $8,613.00[4] from Mountain Bell's accounting department for enclosure with the letter.[5] However, on or about June 21, 1985, rather than delivering the check to the person holding the letter, Mountain Bell's accounting department mailed the check directly to Estate.[6] Upon discovering that the check had been sent separately, Mountain Bell's bill payment supervisor sent the letter without enclosing a check, on about June 28, 1985.[7] Because it was sent by certified mail, it was not received until August 5, 1985.[8] At the time Estate received Mountain Bell's letter, it had not negotiated the check.[9] Estate knew that the $8,613.00 check that it had received earlier was the check referred to in Mountain Bell's letter of June 14, 1985.[10]

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[4] $8,613.00 represented the difference between the amount of the bill and the charges that Mountain Bell disputed.

[5] Tripp Transcript of Jan. 13 at 45.

[6] Tripp Transcript of Jan. 13 at 44-46.

[7] Tripp Transcript of Jan. 13 at 45; Smith Transcript of Jan. 13 at 5.

[8] Transcript of Jan. 12 at 11-12.

[9] Exhibit 8; Response to Defendant's Second Set of Requests for Admissions #7, R. at 101.

[10] Response to Defendant's Second Set of Requests for Admissions #8, R. at 101; Tripp Transcript of Jan. 13 at 24-25. Smith Transcript of Jan. 13 at 12.

On August 8, 1985, Estate filed suit to recover the entire amount of its bill, $30,162.50. (R. 2) It did not cash the $8,613.00 check until on or about October 28, 1985, when the check was negotiated and deposited for collection.[11] Estate later amended its complaint to claim $21,549.50. (R. 24)

On about July 31, 1986, Mountain Bell filed a motion for summary judgment, asserting that Estate's negotiation of the check for $8,613.00, with knowledge that it was offered in full satisfaction of Mountain Bell's obligation to Estate, constituted an accord and satisfaction. (R. 45) Judge Murphy denied the motion in a Summary Decision and Order, (R. 127)[12] and the case later went to trial before Judge Hanson. In denying Mountain Bell's affirmative defense of accord and satisfaction, Judge Hanson (the trial judge) relied heavily on Judge Murphy's Summary Decision denying Mountain Bell's Motion for Partial Summary Judgment, stating that he considered that ruling to be the law of the case.[13] No finding of fact was made to support the denial of the accord and satisfaction defense. (R. 270)

Neither Judge Murphy nor Judge Hansen ever characterized the denial of Mountain Bell's motion for summary judgment as being a ruling on the merits of the accord and satisfaction defense,

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[11] Exhibit 8; Response to Defendant's Second Set of Requests for Admissions #9, R. at 101.

[12] The Summary Decision and Order is attached hereto as Appendix D.

[13] Transcript of Jan. 15 at 3-4.

precluding the introduction of evidence on that issue at the trial; in fact, considerable evidence on that issue was introduced at the trial. No order was ever entered granting Estate summary judgment on that issue. However, the Court of Appeals treated Judge Murphy's denial of Mountain Bell's motion as having the effect of a ruling on the merits, or a summary judgment in Estate's favor on the accord and satisfaction defense. (Slip Op. at 4-6) In a split decision, the Court of Appeals affirmed the judgment except for the award of compounded interest, and remanded to the trial court for amendment of the judgment in that respect. (Slip Op. at 8-9) Judge Jackson filed a dissenting opinion. (Slip Op. at 10-11)

ARGUMENT

NEGOTIATION OF A CHECK OFFERED IN FULL SETTLEMENT OF AN UNLIQUIDATED CLAIM CREATES AN ACCORD AND SATISFACTION, NOTWITHSTANDING THE PAYEE'S SUBJECTIVE INTENTION TO THE CONTRARY.

The Court of Appeals' principal error was its holding that even though Estate negotiated Mountain Bell's check knowing that it was offered in full satisfaction of the disputed claim, "the mutual assent for the would-be accord is lacking." (Slip Op. at 7) The Court elaborated:

> [T]here is no indication that Estate Landscape assented to the letter as an accord. Its signature on the check is not an assent to an accord not found on the face of the check as a restrictive endorsement, where the party to whom the accord is offered has expressly rejected the proposed accord, continued the dispute, and filed litigation to resolve it adversarially in court.

(Id., footnote omitted)

Later in the majority opinion, the Court acknowledged:

> It would, perhaps, be possible to offer an accord and provide in the offer that cashing an accompanying check would be acceptance of the offer, since the offeror can, within reason, specify the act that shall constitute acceptance.

(Slip Op. at 8; footnote omitted). However, the Court failed to conclude that precisely such a circumstance existed in this case. Rather, the Court stated, "However, the offeree can also reject the offer, after which there is nothing left to accept." (Id.) The Court then concluded that because Estate had "rejected" Mountain Bell's offer of an accord, it was thereafter free (and perhaps even duty-bound) to negotiate the check as a partial payment, without risking a finding of accord and satisfaction. (Id.)

In essence, the Court of Appeals has held that subjective, mutual assent is a condition precedent for accord and satisfaction, and that assent may not be inferred as a matter of law from the negotiation of a check offered in full satisfaction of a bona fide dispute over an unliquidated claim. This analysis is directly contrary to Utah law as expressed in Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985) and Cove View Excavating and Construction Co. v. Flynn, 758 P.2d 474 (Utah App. 1988).

In Marton, the plaintiff remodeled defendant's home under a "time and materials" contract. The parties disagreed on the proper charges for the work (defendant asserting, as in the case at bar, that the number of hours claimed was excessive). Defendant sent plaintiff a check with the notation:

> Endorsement hereof constitutes full and final satisfaction of any and all claims payee may have against [defendant] or his property, arising from any circumstances existing on the date hereof.

706 P.2d at 608. The plaintiff wrote defendant a letter refusing to accept the check in full payment and demanding the balance. When defendant did not pay, plaintiff wrote "not full payment" on the check, then cashed it and sued for the balance. Under those circumstances, the plaintiff obviously did not subjectively assent to the check as full payment. Nevertheless, this Court held that the negotiation of the check created an accord and satisfaction:

> [W]hen a bona fide dispute arises . . . and a check is tendered in full payment of an unliquidated claim . . . arising out of a "time and materials" contract, the creditor may not disregard the condition attached. Corbin on Contracts § 1279 explains:
>
> > The fact that the creditor scratches out the words "in full payment," or other similar words indicating that the payment is tendered in full satisfaction, does not prevent his retention of the money from operating as an assent to the discharge. The creditor's action in such case is quite inconsistent with his words. It may, indeed, be clear that he does not in fact assent to the offer made by the debtor, so that there is no actual "meeting of the minds." But this is merely another illustration of the fact that the making of a contract frequently does not require such an actual meeting.

706 P.2d at 609 (emphasis added). Apropos to the case at bar, this Court then quoted with approval an illustration from the Restatement (Second) of Contracts § 281:

> 6. A contracts with B to have repairs made on A's house, no price being fixed. B sends A a bill for $1,000. A honestly disputes this amount and sends a letter explaining that he thinks the amount excessive and is enclosing a check for $800 as payment in full. B, after reading the letter, indorses the check and deposits it in his bank for collection. B is bound by an accord under which he promises to accept payment of the check in satisfaction of A's debt for repairs. The

> result is the same if, before indorsing the check, B adds the words "Accepted under protest as part payment." The result would be different, however, if B's claim were liquidated, undisputed and matured.

706 P.2d at 609-10 (emphasis added) This Court then cited further cases[14] for the proposition that

> a creditor cannot avoid the consequences of his exercise of dominion by a declaration that he does not assent to the condition attached by the debtor. The last cited case succinctly stated the law to be, "The law gave the plaintiffs the choice of accepting the check on defendant's terms or of returning it."

706 P.2d at 610 (emphasis added). Finally, this Court quoted with approval the following statement from Pillow v. Thermogas Company of Walnut Ridge, 6 Ark. App. 402, 644 S.W.2d 292 (1982):

> If we were to decide that a creditor can reserve his rights on a "payment in full" check, it would seriously circumvent what has been universally accepted in the business community as a convenient means for the resolution of disagreements.

706 P.2d at 610.

The holding and analysis of Marton correctly state the law of Utah and of the vast majority of other jurisdictions. See generally, Annotation, Modern Status of Rule that Acceptance of Check Purporting to be Final Settlement of Disputed Amount Constitutes Accord and Satisfaction, 42 A.L.R. 4th 12 (1985). More importantly to this petition, Marton directly contradicts the Court of Appeals' analysis in this case, which erroneously concluded that subjective, mutual assent is necessary to an accord and satisfaction, and that a creditor may reject the condition

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[14] Miller v. Prince Street Elevator Co., 41 N.M. 330, 68 P.2d 663 (1937); Wilmeth v. Lee, 316 P.2d 614 (Okla. 1957); Graffam v. Geronda, 304 A.2d 76 (Me. 1973).

attached to a "full satisfaction" check, and cash it with impunity. The Court of Appeals' decision cannot be reconciled with, and must therefore yield to, the rule of law stated in Marton.

In Cove View Excavating and Construction Co. v. Flynn, 758 P.2d 474 (Utah App. 1988), the defendant disputed plaintiff's charges for construction equipment rental under a contract that specified rates, but not a specific term. The defendant sent plaintiff a check with the notation on the front of the check: "pmt in full to date labor & materials," and a further notation on the back of the check: "payment in full for all labor and materials to 6/26/84." On the advice of counsel, the defendant crossed out the restrictive language on the back of the check and negotiated it, then sued for the balance.

The Court of Appeals reversed a judgment for the plaintiff, holding that the negotiation of the check created an accord and satisfaction, "notwithstanding [plaintiff's] actual intent." 758 P.2d at 477. The Court further stated:

> In light of the express condition on the check, the fact that Grundy did not subjectively intend to accept the check as full payment of Flynn's obligation is legally irrelevant. A creditor may not disregard the condition attached to a check tendered in full payment of an unliquidated or disputed claim. [citing Marton] Grundy's options were to accept the check on Flynn's terms or return it. [citing cases] His negotiation of Flynn's check was an acceptance of Flynn's offer of full payment, notwithstanding his lack of any actual intent to accept it as such.

758 P.2d at 478 (emphasis added).

It is obvious that the rule announced in Cove View, which followed Marton, is incompatible with the Court of Appeals' ruling in this case. The majority of the Court of Appeals misapplied the concept of mutual assent, requiring actual intent to accept an offer of accord, whereas the law infers mutual assent and acceptance from the act of negotiating a full payment check with knowledge of the condition, regardless of the payee's actual intent or efforts to avoid the condition.[15] For this reason, the petition for certiorari must be granted to avoid an irreconcilable

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[15] See also, Flagel v. Southwest Clinical Physiatrists, P.C., 157 Ariz. 196, 755 P.2d 1184, 1190 (1988)("[Defendant] clearly expressed its intent that the check was paid as a settlement in full. It may be that [plaintiff] did not assent and there was no actual meeting of the minds. However, the making of a contract in this circumstance does not require such an actual meeting of the minds. As a matter of law, an accord and satisfaction occurred when [plaintiff] cashed the check."); Air Van Lines, Inc. v. Buster, 673 P.2d 774, 779 (Alaska 1983)("[R]egardless of [plaintiff's] intentions, a purported reservation of rights is ineffective when a clearly conditional tender is accepted."); Van Riper v. Baker, 61 Or. App. 540, 658 P.2d 537, 539 (1983)("It is well settled that 'one who accepts and cashes a check which purports by notation or by the terms upon which it was tendered to be in full satisfaction of a disputed claim between the parties has accepted the payment on those terms.' . . . . This rule applies even when the amount tendered is no greater than the debtor admits he owes . . . or when the creditor does not intend that his act of cashing the check constitute an acceptance . . . or when the creditor asserts to the debtor that the check is received only in part payment."); Welbourne & Purdy, Inc. v. Mahon, 54 A.D.2d 1046, 388 N.Y.S.2d 369, 370 (1976)("[N]either the [plaintiff's] representative's declarations nor the [plaintiff's] manager's protest in suing for the balance can change the rule that '[w]hat is said is overridden by what is done, and assent is imputed as an inference of law'."); Miller v. Prince Street Elevator Co., 68 P.2d 663, 665 (1937)("When the appellee accepted and cashed such check and appropriated unto himself the proceeds thereof, well knowing that such payment was burdened with such condition, he thereby accepted it as tendered. He could not accept the benefit of such tender without likewise accepting its condition.").

conflict with prior cases decided both by this Court and by another panel of the Court of Appeals.

RESPECTFULLY SUBMITTED this 21st day of June, 1990.

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY

By _____
Floyd A. Jensen, Attorney

MAILING CERTIFICATE

I hereby certify that four true and correct copies of the foregoing Petition for Writ of Certiorari were mailed, postage prepaid, to each of the following on the 21 day of June, 1990:

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APPENDIX

A. Estate Landscape and Snow Removal Specialists, Inc. v. The Mountain States Telephone and Telegraph Company, No. 880428-CA, slip op. (Utah App., filed May 24, 1990)

B. Findings of Fact and Conclusions of Law

C. Judgment

D. Summary Decision and Order denying Mountain Bell's Motion for Summary Judgment

E. Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985)

F. Cove View Excavating and Construction Co. v. Flynn, 758 P.2d 474 (Utah App. 1988)

A. Estate Landscape and Snow Removal Specialists, Inc. v. The Mountain States Telephone and Telegraph Company, No. 880428-CA, slip op. (Utah App., filed May 24, 1990)

IN THE UTAH COURT OF APPEALS

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Estate Landscape and Snow Removal Specialists, Inc.,	)	
Plaintiff and Appellee,	)	OPINION (For Publication)
v.	)	
	)	Case No. 880428-CA
Mountain States Telephone and Telegraph Company,	)	
Defendant and Appellant.	)	

Salt Lake County, Third District,
The Honorable Michael R. Murphy and Timothy R. Hanson.

Attorneys: Floyd A. Jensen, Salt Lake City, for Appellant
David D. Loreman and Lowell V. Summerhays, Murray, for Appellee

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Before Judges Davidson, Jackson, and Larson.[1]

LARSON, Judge:

This is an action seeking to collect amounts alleged to be due under a contract for snow removal services rendered by Estate Landscape and Snow Removal Specialists, Inc. (Estate Landscape). Defendant Mountain States Telephone and Telegraph Company (Mountain Bell) appeals from a judgment in favor of Estate Landscape.

Estate Landscape and Mountain Bell entered into a written contract which provided that Estate Landscape would remove snow from certain buildings occupied by Mountain Bell in return for payment at a specified rate. Estate Landscape performed its work

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1. John Farr Larson, Senior Juvenile Court Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp. 1989).

suitably, and billed Mountain Bell twice, once for work through December 27 and again at the end of the snow season.[2] The billing separately listed each snow removal item by date.

Mountain Bell paid the first bill, but considered the $30,162.90 total of the second bill to be excessive for the services at its Alta office. It therefore sent Estate Landscape a check for only $8,613. The check did not contain a restrictive endorsement or a waiver on its face. Upon receipt of the check, Estate Landscape responded by acknowledging partial payment and requesting the balance remaining, but Mountain Bell refused to pay the balance. Next, Mountain Bell sent Estate Landscape a letter[3] explaining its position concerning the bill for the Alta office. According to the letter, the contract for the Alta office provided that Estate Landscape would remove snow when it reached a depth of four inches. From snowfall records for Alta, it appeared that Estate Landscape had billed for snow removal on days when the snowfall was less than four inches. On the basis of the snowfall records, therefore, Mountain Bell refused to pay for snow removal on certain days for which Estate Landscape had charged for its services. The letter specifically detailed all contested snow removal services by date. Mountain Bell's letter concluded:

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2. The contract required monthly statements, rather than a single statement at the end of the season. Mountain Bell claimed that Estate's failure to provide monthly billings was a breach, but the trial court found that the breach was not material, and thus, it did not excuse Mountain Bell from its obligations. See Nielson v. Droubay, 652 P.2d 1293, 1297 (Utah 1982); Darrell J. Didericksen & Sons, Inc. v. Magna Water and Sewer Improvement Dist., 613 P.2d 1116, 1119 (Utah 1980); 4 A. Corbin, Corbin on Contracts § 946 (1951). That finding is not contested on appeal.

3. The check for $8,613 was to have been sent with the letter; however, Mountain Bell's accounting department mailed the check without the letter. Upon learning that the check had already been mailed, Mountain Bell sent its letter, which reached Estate Landscape before it cashed the check from Mountain Bell. Estate Landscape admits that it knew that the letter was in reference to the check it had received from Mountain Bell but had not as yet cashed.

> Based on the above identified billing discrepancies we have enclosed[4] a check for $8613.00 which is payment in full for satisfaction of contracted services. If you are not willing to accept that sum, $8613.00 in full satisfaction of sums due, DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid.

(Emphasis in original).

When Estate Landscape received the letter, the check it had earlier received from Mountain Bell had not been cashed. Estate Landscape responded to Mountain Bell's letter by commencing this action against Mountain Bell. Initially, Estate Landscape complained for the entire $30,162.90 of its second bill for the winter of 1984-85. About two weeks after filing suit, Estate Landscape endorsed the check from Mountain Bell and cashed it, then amended its complaint against Mountain Bell to seek only the difference between the amount of the check and the amount billed.

Mountain Bell moved for summary judgment on the grounds that its letter and check tendered to Estate Landscape were an accord and satisfaction of its obligation under the snow removal contract. The district court, per Judge Michael R. Murphy, denied the motion, noting that Mountain Bell admitted that it owed the amounts tendered in the check. The case proceeded to trial before the bench.

At trial, Judge Timothy R. Hanson considered the earlier denial of summary judgment to have resolved the question of accord and satisfaction, and granted judgment to Estate Landscape for the amount of its bill, less certain charges for work not mentioned in the contract. The judgment included interest accruing before judgment, compounded annually. Mountain Bell appeals.

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4. Note that the check was not enclosed, but rather had erroneously been sent earlier. Estate Landscape admitted, however, that it recognized that the letter referred to the check it had earlier received from Mountain Bell.

Factual Standard of Review in Summary Judgment

Mountain Bell now argues that the trial court erred in treating its motion for summary judgment as dispositive of its accord and satisfaction defense and thereafter refusing to reopen that issue at trial on the grounds that it was law of the case. Mountain Bell argues that the combined effect of the dispositive summary judgment and the refusal to try the issue was an unfairly skewed view of the facts in the district court. Mountain Bell argues that the court views the facts for summary judgment purposes in a light unfavorable to the moving party, and therefore, because the summary judgment was treated as conclusive against the movant, the movant here, Mountain Bell, never had a chance for a fair view of the facts on the issue.

Mountain Bell, however, is not precisely correct in thus describing a court's factual viewpoint in deciding a motion for summary judgment. Although it may be true for most summary judgments that the court views the facts in favor of the nonmovant, that formulation takes into account only perhaps the most common outcomes of a motion for summary judgment, in which the moving party either receives the judgment it seeks, or all judgment is denied and the issue reserved for further consideration. However, in this case, Mountain Bell moved for summary judgment, and its motion was denied on the merits, and that denial effectively disposed of Mountain Bell's accord and satisfaction defense.[5] Later, that disposition was regarded

5. This course of action was not erroneous. See National Expositions v. Crowley Maritime Corp., 824 F.2d 131, 133 (1st Cir. 1987); British Caledonian Airways Ltd. v. First State Bank, 819 F.2d 593, 595 (5th Cir.1987); Pueblo of Santa Ana v. Mountain States Tel. & Tel Co., 734 F.2d 1402, 1408 (10th Cir. 1984), reversed on other grounds, 472 U.S. 237 (1985); Giovanelli v. First Fed. Savs. & Loan Ass'n, 120 Ariz. 577, 587 P.2d 763, 768 (1978); 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2720 at 29-35 (1983); 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.12 (1987).

as the law of the case, and the accord and satisfaction issue was not reopened.[6]

Recognizing that the party adversely affected by the summary judgment has not had an opportunity for trial, the court views the facts in the light most favorable to that party.[7] In situations in which summary judgment is granted, the party adversely affected would be the party who did not move for summary judgment. If summary judgment is denied on the merits and a claim or defense of the movant thereby eliminated, then the facts are viewed in the light most favorable to the moving party. Summary judgment may also be denied without reaching the merits of any claim or defense, often because the court cannot

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(Footnote 5 continued)

In the absence of a cross-motion, the trial court should, on its own initiative, assure that the moving party has had a fair opportunity to address the grounds for the adverse judgment. See Bonilla v. Nazario, 843 F.2d 34, 37 (1st Cir. 1988). A careful practitioner would therefore file a cross-motion in an appropriate case, to avoid concerns over the adequacy of the movant's opportunity to address all of the material issues. In this case, the district court, and this court as well, hold that Mountain Bell failed to carry its burden in establishing an accord. Mountain Bell bore in essence that same burden both in seeking summary judgment in its favor and in avoiding an adverse summary judgment. We therefore conclude that it had ample opportunity to establish an accord but has not succeeded in doing so.

6. Mascaro v. Davis, 741 P.2d 938 (Utah 1987); Sittner v. Big Horn Tar Sands & Oil, Inc., 692 P.2d 735, 736 (Utah 1984); Salt Lake City Corp. v. James Constructors, Inc., 761 P.2d 42, 44-45 (Utah Ct. App. 1988); Conder v. A.L. Williams & Assocs., 739 P.2d 634, 636 (Utah Ct. App. 1987); see also State v. Lamper, 779 P.2d 1125, 1129 (Utah 1989) (extraordinary intervening circumstances justifying reconsideration of a decided issue).

7. See Branham v. Provo School Dist., 780 P.2d 810 (Utah 1989); Blue Cross & Blue Shield v. State, 779 P.2d 634, 636 (Utah 1989); Atlas Corp. v. Clovis Nat'l Bank, 737 P.2d 225, 299 (Utah 1987); Lantz v. National Semiconductor Corp., 775 P.2d 937 (Utah Ct. App. 1989).

reconcile the material elements of the parties' versions of the facts, and thus cannot grant a summary judgment under Utah R. Civ. P. 56(c).[8] Since any material difference in the parties' versions of the facts will preclude summary judgment, the shadings of light in which the facts are viewed cannot make a substantial difference in the result, even if the shading applied is erroneous.

In this case, Mountain Bell was the movant for summary judgment on the accord and satisfaction issue. The district court's memorandum decision on Mountain Bell's motion was clearly intended to lay the defense of accord and satisfaction to rest. Since a defense of Mountain Bell's was thereby eliminated, the facts should be viewed in the light favorable to Mountain Bell. The record does not explicitly note whether the district court thus viewed the facts; however on appeal, we view the facts supporting a summary judgment through the same lens filter as the trial court.[9] Therefore, since the issue of correctness of the summary judgment on its merits is before us, we proceed to review it in the light most favorable to Mountain Bell.

Lack of an Accord

In denying summary judgment on the merits, the district court reasoned that the contract for snow removal in this case was severable, and that the scope of the accord was therefore limited to only part of the contract. According to this

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8. Because a summary judgment motion can be denied for at least two reasons, either because judgment is not merited or because factual issues preclude a grant of summary judgment, a trial court decision denying summary judgment should be expressed in a brief, written statement, identifying the grounds for denying summary judgment. See Utah R. Civ. P. 52(a). In part because of the tentatively slanted view on the facts, findings are not ordinarily made in resolving a motion for summary judgment, even if the motion is resolved on the merits. The main purpose of findings is to resolve material factual issues, Acton v. J.B. Deliran, 737 P.2d 996 (Utah 1987), and summary judgment cannot be granted if such issues exist. See Taylor v. Estate of Taylor, 770 P.2d 163, 168 (Utah Ct. App. 1989). Moreover, since the favorable factual viewpoint applied for summary judgment purposes is valid only for the motion at hand, the finality attributed to findings would perhaps tend to give too general a validity to a view of the facts that is entirely ad hoc.

9. Wycalis v. Guardian Title of Utah, 780 P.2d 821, 824 (Utah Ct. App. 1989), cert. denied, 127 Utah Adv. Rep. 38 (1990).

reasoning, the accord and satisfaction did not fully discharge the contract.[10]

Identifying which claim or claims are the subject of an accord and satisfaction depends on the manifested intent of the parties.[11] However, before we can determine the contractual intent of the parties, we must have a contract. There is no contractual intent to be discovered where there has been no mutual assent. In this case, the mutual assent for the would-be accord is lacking.[12]

From Mountain Bell's point of view, the accord is contained essentially in its letter of June 14, 1985, to Estate Landscape. However, this letter is entirely unilateral; there is no indication that Estate Landscape assented to the letter as an accord. Its signature on the check is not an assent to an accord not found on the face of the check as a restrictive endorsement,[13] where the party to whom the accord is offered has expressly rejected the proposed accord, continued the dispute, and filed litigation to resolve it adversarially in court. It is therefore apparent that an accord was offered, a check tendered in anticipation that an accord would be reached,

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10. See Bennett v. Robinson's Medical Mart, Inc., 18 Utah 2d 186, 417 P.2d 761 (1966); Dillman v. Massey Ferguson, Inc., 13 Utah 2d 142, 369 P.2d 296 (1962); cf. Marton Remodeling v. Jensen, 706 P.2d 6097, 608-09 (Utah 1985); Allen-Howe Specialties v. U.S. Constr., Inc., 611 P.2d 705 (Utah 1980). While we recognize that Mountain Bell's letter may have had the effect of severing the contract, we do not reach that question, because, for lack of mutual assent, there was no contract to be severed.

11. Quealy v. Anderson, 714 P.2d 667, 669 (Utah 1986) ("The scope of an accord and satisfaction is determined by the intention of the parties. . . ."); see Petersen v. Petersen, 709 P.2d 372, 375 (Utah 1985).

12. We therefore affirm, but for a reason differing somewhat from the trial court's grounds for its decision. See Cox v. Hatch, 761 P.2d 556, 561 (Utah 1988).

13. Cf. Cove View Excavating & Constr. Co. v. Flynn, 758 P.2d 474 (Utah Ct. App. 1988), in which the acceptance of the accord was effected by negotiating a check bearing an assent to the accord on its face.

and a letter sent indicating what Mountain Bell intended and would do if the check were negotiated, but there is no indication of Estate Landscape's assent to the accord. Even in the light most favorable to Mountain Bell, the evidence simply falls short of demonstrating Estate Landscape's acceptance of Mountain Bell's offer to settle the account. It would, perhaps, be possible to offer an accord and provide in the offer that cashing an accompanying check would be acceptance of the offer, since the offeror can, within reason, specify the act that shall constitute acceptance.[14] However, the offeree can also reject the offer, after which there is nothing left to accept. We believe that the telephone conference continuing the dispute and the filing of litigation amount to a rejection of the offered accord. After the litigation was underway, there remained the question of what to do with Mountain Bell's tendered check in Estate Landscape's possession. Estate Landscape acted within its rights in cashing check as payment of the portion of its claim that Mountain Bell agreed was owing; in fact, it may have had a duty so to act in order to properly mitigate its damages. Thus, even if we resolve any immaterial factual doubt in Mountain Bell's favor, this appears to be a situation in which one party asserts an accord to which the other party, for all that appears, never agreed. In such a case, accord and satisfaction is not a defense for lack of a binding accord.

Compounding of Interest

Mountain Bell's final argument is that, even if it is liable for the amount of the judgment, the interest on the judgment should not have been compounded. The general rule is that simple, not compound, interest accrues on a judgment, unless the parties contract otherwise,[15] which they have not in this case, or unless the statute providing for interest on judgments expressly requires compounding, which ours does not.[16]

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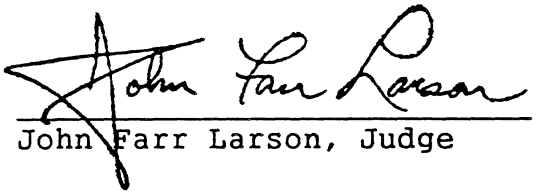
14. Crane v. Timberbrook Village, Ltd., 774 P.2d 3, 4 (Utah Ct. App. 1989).

15. See Mountain States Broadcasting Co. v. Neale, 783 P.2d 551, 554-55 (Utah Ct. App. 1989) (construing a note as not providing for compound interest).

16. See Utah Code Ann. § 15-1-4 (1987); 47 C.J.S. Interest and Usury § 24 (1982).

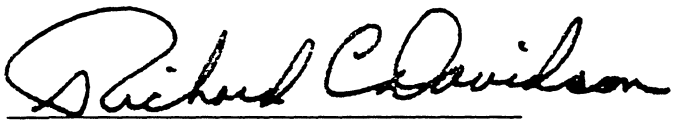
This rule against compound interest on judgments is consistent with the general judicial disfavor of interest on interest.[17] It is also of long standing and forms part of the backdrop against which the Legislature has statutorily provided for interest on judgments. We see no compelling reason to alter this longstanding gloss on the judgment interest statute.[18] We therefore decline the invitation to engraft onto the statute judicial discretion to allow compound interest[19] and reverse as to the award of compound interest.

Except in regard to the interest provided in the judgment, the trial court's decision is affirmed. We vacate the provisions of the judgment relating to interest and remand for amendment of the judgment to provide for simple, rather than compound, interest.



John Farr Larson, Judge

I CONCUR:



Richard C. Davidson, Judge

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17. Watkins & Faber v. Whiteley, 592 P.2d 613, 616 (Utah 1979); Mountain States Broadcasting Co., 783 P.2d at 555.

18. See Hackford v. Utah Power & Light Co., 740 P.2d 1281, 1283 (Utah 1987).

19. See Stroud v. Stroud, 758 P.2d 905 (Utah 1988), aff'g 738 P.2d 649 (Utah Ct. App. 1987).

JACKSON, Judge (dissenting):

The decision and order on summary judgment was entered in this case on December 29, 1986. The order denied Mountain Bell's motion, which asserted the affirmative defense of accord and satisfaction. The motion judge, who did not have before him our recent decisions in Cove View Excavating and Constr. Co. v. Flynn, 758 P.2d 474 (Utah Ct. App. 1988), and Masonry Equipment & Supply v. Willco Assocs., Inc., 755 P.2d 756 (Utah Ct. App. 1988), ruled that "this case is controlled by Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985)." But the springboard for the judge's legal analysis was that each separate day of work pursuant to the written contract constituted a separate claim. The court expressed "[reluctance] to suggest that more than one claim exists in circumstances where the dispute arises under a single written contract," but felt compelled by Marton to do so.

The motion judge stated, "In resolving this matter, the court cannot artificially bifurcate a single dispute in determining" whether there had been an accord and satisfaction. Contrary to that statement, the court did more than bifurcate the claim. The court treated the matter as one of multiple claims, i.e., each day's work was a claim. Thus, he considered the work on each of the thirty-one disputed days to support a separate claim for relief. I consider that premise untenable.

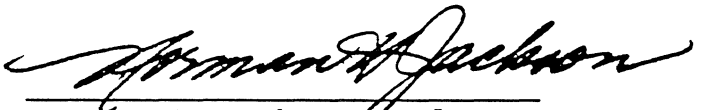
While the lower court did not have the benefit of Cove View and Masonry Equipment, my colleagues do. They have nonetheless elected to completely ignore those opinions--as well as the lower court's reliance on Marton, a decision the majority opinion tucks away in a footnote--and engage in a "mutual assent" analysis.

I would rely on Cove View, where, as in this case, the parties simply disagreed over the total amount to be paid on a contract. The $8,613 check was tendered by Mountain Bell with the following condition attached, with the emphasis in the original:

> Based on the above identified billing discrepancies [sic] we have enclosed a check for $8613.00 which is payment in full for satisfaction of contracted services. If you are not willing to accept that sum, $8613.00 in full satisfaction of sums due, DO NOT negotiate the check, for upon your negotiation of that check, we will treat the matter as fully paid.

This language clearly asserts a dispute over billing discrepancies, states three times that $8,613 is being tendered as full payment, and warns against negotiating the check. What more could Mountain Bell say to set up an offer of accord and satisfaction? Although the offer was found in Mountain Bell's letter, not on the check itself, Estate Landscape admitted knowing that the express conditions in the letter related to the $8,613 check, which it had received separately but had not yet negotiated. A creditor may not disregard the condition attached to a check tendered in full payment of a disputed claim. Cove View, 758 P.2d at 478 (citing Marton Remodeling, 706 P.2d at 609). Although the majority mysteriously finds "no indication" of Estate Landscape's assent to the offer of accord, negotiation of the $8,613 check was itself a conclusive manifestation of assent, resulting in an accord and satisfaction as a matter of law regardless of its subjective intent. See id.

Estate Landscape negotiated the check. That is the end of the matter. I would reverse.



Norman H. Jackson, Judge

B. Findings of Fact and Conclusions of Law

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IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

ESTATE LANDSCAPE AND SNOW REMOVAL SPECIALISTS, INC., a Utah corporation, Plaintiff, vs. MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Civil No.: C85-5197 Judge: Timothy R. Hanson

The above-entitled matter, having come on regularly before the Court, the Honorable Timothy R. Hanson presiding, the Plaintiff having been represented by Lowell V. Summerhays and David D. Loreman, and the Defendant having been represented by Floyd Jensen, and upon the trial of this matter having been heard, the following Findings of Fact and Conclusions of Law were made:

FINDINGS OF FACT

1. The Court finds that there was a contract and that the parties were governed by the contract.

2. The Court finds that the work was not substandard.

3. The Court finds that the contract was breached by the Plaintiff's failure to submit monthly balance statements, however, the Court finds that the breach was not material.

4. The Court finds that the true intent of the parties was that the Plaintiff was entitled to bill for each four (4) inches of snow removed; the contract was not clear and is ambiguous.

5. The Court finds that the Bobcat was a front load and was within the terms of the contract. The following year the Defendant again agreed to its use at $55.00 per hour.

6. The Court finds that the Plaintiff was to get authorization for the use of further equipment, and that the dump truck was not authorized.

7. The Court finds that the $10,000.00 limit on the contract was waived by all parties based upon the conduct of all of the parties.

8. The Court finds regarding the issue of damages that Defendant has not paid Plaintiff for plowing and the use of the front loader costs.

9. The Court finds that the total bill was $30,162.50, and the amount disputed is $21,549.50. The Court finds that the amount paid by Mt. Bell on the total bill was $8,613.00.

10. The Court finds that the following dates and amounts were not paid by Mt. Bell, and that these amounts do not include additional sums for the use of dump trucks.

DATE	AMOUNT
1984	$ 990.00
1/08/85	255.00
1/21/85	255.00
1/26/85	550.00
2/01/85	170.00
2/04/85	510.00
2/05/85	425.00
2/06/85	425.00
2/07/85	510.00
2/08/85	340.00
2/11 - 12/85	1,320.00
2/13/85	1,017.50
2/15/85	170.00
2/18/85	255.00
2/20/85	907.50
2/22/85	170.00
2/23/85	170.00
2/25/85	170.00
2/27/85	170.00
3/02/85	255.00
3/06/85	425.00
3/07/85	170.00
3/10/85	170.00
3/15/85	170.00
3/16/85	255.00
3/18/85	255.00
3/20/85	255.00
3/25/85	255.00
TOTAL:	$ 10,990.00

11. The Court finds that interest accrued on the amount due and owing from April 16, 1985, at ten percent (10%) compounded per annum, until the date this judgment is entered. Thereafter, the judgment will run at twelve percent (12%) per annum, at the maximum legal rate, plus cost, per Rule 54, Utah Code of Civil Procedures.

CONCLUSIONS OF LAW

1. Based on the Court's Finding of Facts, it is hereby concluded that there was no accord and satisfaction in that the Order of Judge Michael R. Murphy delineated the area fully and is the law of the case. Even if it were not the law of the case, Exhibit 6 introduced into evidence did not fulfill the requirements of an accord and satisfaction.

2. Based upon the foregoing Findings of Facts, this Court concludes that there was a written contract and the theories of quantum merit and unjust enrichment do not apply in this case.

3. The Court also concludes that there were ambiguities in the contract and as the contract was drafted by Defendant Mt. States Telephone and Telegraph, that the contract must be construed against the party who drafted it.

4. Based upon the Findings of Fact in this case, it is hereby concluded that Defendant is responsible for payment on each increment of four (4) inches, and the time charged for the Bobcat, and that no dump trucks were allowed based on no prior written modifications of the contract to include such dump trucks, and therefore, all costs relating to those dump trucks are found not to be part of the contract.

5. IT IS THEREFORE CONCLUDED, based on the foregoing Findings of Fact, that Estate Landscape and Snow Removal Specialists, Inc. had fulfilled their contract to Mt. States Telephone and Telegraph Co., and that there is a sum due and owing to Estate Landscape and Snow Removal Specialists, Inc. in the amount

of $10,990.00, plus interest from April 15, 1985, at the rate of ten percent (10%) per annum, compounded annually, until the date this judgment is entered. Thereafter, interest will be calculated at twelve percent (12%) per annum, including costs of court.

DATED this 1 day of April, 1988.

BY THE COURT:

Honorable Timothy R. Hanson

ATTEST
H. DIXON HINDLEY
Clerk of the Court
By _____

HAND DELIVERY CERTIFICATE

I HEREBY CERTIFY that on the 22 day of March, 1988, I caused to be hand delivered a copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to:

Floyd A. Jensen, Esq.
Mountain States Telephone & Telegraph Co.
250 Bell Plaza, Room 1610
Salt Lake City, Utah 84111
Attorney for Defendant.

Dorinda C. Reese

C. Judgment

Lowell V. Summerhays - 3154
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Telephone: (801) 261-2887

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

Bk 213 No. 8999

4-1-88- 2:35 pm.

ESTATE LANDSCAPE AND SNOW REMOVAL SPECIALISTS, INC., a Utah corporation, Plaintiff, vs. MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, Defendant.	JUDGMENT Civil No.: C85-5197 Judge: Timothy R. Hanson

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The above-entitled matter, having come on regularly before the Court, the Honorable Timothy R. Hanson presiding, the Plaintiff having been represented by Lowell V. Summerhays and David D. Loreman and the Defendant having been represented by Floyd Jensen, and upon the trial of this matter having been heard,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

Based on the Court's Findings of Facts and Conclusions of Law, the Court enters judgment in favor of the Plaintiff and against the Defendant in the amount of $10,990.00, plus interest at the legal pre-judgment rate of ten percent (10%) simple interest per annum, compounded annually since the due date of April 15, 1985, to the date the judgment is entered. Thereafter, it will run at twelve percent (12%) per annum at maximum legal rate, plus costs, per Rule 54 of the Utah Code of Civil Procedure.

DATED this 1 day of April, 1988.

BY THE COURT:

Honorable Timothy R. Hanson

ATTEST
H. DIXON HINDLEY

By _____
Clerk

HAND DELIVERY CERTIFICATE

I HEREBY CERTIFY that on the 22 day of March, 1988, I caused to be hand delivered a copy of the foregoing JUDGMENT to:

Floyd A. Jensen, Esq.
Mountain States Telephone & Telegraph Co.
250 Bell Plaza, Room 1610
Salt Lake City, Utah 84111
Attorney for Defendant.

Dorinda G. Reese

D. Summary Decision and Order denying Mountain Bell's Motion for Summary Judgment

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ESTATE LANDSCAPE AND SNOW REMOVAL SPECIALISTS, INC., a Utah Corporation,	:	SUMMARY DECISION AND ORDER
Plaintiff,	:	CIVIL NO. ~~C-85-5471~~ 685-5197
vs.	:	
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	:	
Defendant.	:	

This Summary Decision and Order is for the purpose of apprising the parties and counsel of the grounds for the court's ruling and accompanying Order. A more elaborate, extensive and polished memorandum decision in this case is not necessary and would serve no useful purpose.

The issue presented is whether, under the undisputed facts in this case, there was an accord and satisfaction absolving defendant from all claims of the plaintiff for alleged breaches of the November 15, 1985 contract for snow removal ("the contract"). The discovery, defendant's memorandum of law, and Exhibit "C" thereto indicate that the defendant's refusal to pay the full amount claimed was premised on its interpretation of Exhibit "A" to the contract and specifically paragraph D thereof entitled "Rates and Charges." It was defendant's position expressed

in its letter of June 14, 1985 that it would not pay for snow removal on the specified dates when weather records indicated snow accumulations of less than four inches. No other basis for disputing the claims exist in the record before this court on defendant's Motion for Summary Judgment. There is no dispute that the amounts tendered were in fact owed in accordance with the terms of the contract.

This case is controlled by Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985). In applying Marton Remodeling to the case at bar it is necessary to determine whether the plaintiff's original assertions constituted a single claim. In resolving this matter, the court cannot artificially bifurcate a single dispute in determining whether the purported accord and satisfaction extinguished all of plaintiff's claims. Generally, the court would be reluctant to suggest that more than one claim exists in circumstances where the dispute arises under a single written contract. This case, however, is controlled by contrary precedent.

The Supreme Court in Marton Remodeling set forth two examples of circumstances where the dispute involved more than one claim. It did so by citing with approval its decisions in Bennett v. Robinson's Medical Mart, Inc., 18 Utah 2d 186, 417 P.2d 761 (1966), and Dillman v. Massey Ferguson, Inc., 13 Utah 2d 142, 369 P.2c 296 (1962).

In Dillman the parties entered into a contract for the termination of a dealership which included a provision whereby the defendant was to purchase unused parts. Defendant sorted through the parts, accepted some, returned others, and tendered a check for only the parts accepted. The Court held that the cashing of the checks did not constitute an accord and satisfaction as to those parts rejected and returned to plaintiff. Whereas the Court in Dillman may have placed some reliance on the language of the purported release as being consistent with its ruling, the Court in Marton Remodeling expressly distingusihed Dillman as a case which "involved two claims." 706 P.2d at 609.

This court cannot distinguish Dillman from the instant case. Much like the defendant in Dillman, the defendant here accepted some claims and rejected others. As in Dillman, there appears to be no dispute as to those claims paid. To paraphrase Dillman: "The dispute was not as to the amount found due for [the services paid] but as to whether [defendant] breached its contract by refusing to [pay for all services rendered]." 369 P.2d at 298. As in Dillman, the services paid for by defendant were a liquidated amount for snow removal on the occasions when here was no contract dispute concerning accumulation. The doctrine of accord and satisfaction generally applies only to nliquidated claims. See, Calamari & Perillo, Contracts, Sections -10 to -12 (2d Ed. 1977).

Whereas there are other factors not referenced in this Summary Decision and Order supporting denial of summary judgment (e.g., intent, consideration, date of acceptance of payment, and the reasonable expectations of the parties), the Dillman case, in light of its interpretation and approval in Marton Remodeling, alone requires denial of defendant's Motion.

For the reasons set forth herein, defendant's Motion for Summary Judgment is denied.

Dated this 29th day of December, 1986.

MICHAEL R. MURPHY
DISTRICT COURT JUDGE

ATTEST
H. DIXON HINDLEY
CLERK
BY _____
Deputy Clerk

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Summary Decision and Order, postage prepaid, to the following, this 29th day of December, 1986:

James W. Carter
Attorney for Plaintiff
9 Exchange Place, Suite 1000
Salt Lake City, Utah 84111

Floyd A. Jensen
Attorney for Defendant
250 Bell Plaza, 16th Floor
Salt Lake City, Utah 84111

Marlene Skewes

E. Marton Remodeling v. Jensen, 706 P.2d 607 (Utah 1985)

HALL, C.J., DURHAM and ZIMMERMAN, JJ., concur.

STEWART, J., concurs in the result.

MARTON REMODELING, Plaintiff and Respondent,

v.

Mark JENSEN, Defendant and Appellant.

MARTON REMODELING, Plaintiff and Appellant,

v.

Mark JENSEN, Defendant and Respondent.

Nos. 18400, 18401.

Supreme Court of Utah.

Sept. 17, 1985.

Builder sued to foreclose on mechanic's lien on owner's house and lot for $6,538.12 which builder claimed was due

1. Accord and Satisfaction ⇐11(2)

Builder's cashing of $5,000 check, containing condition that "[e]ndorsement hereof constitutes full and final satisfaction," where valid dispute existed as to amount owing, constituted "accord and satisfaction" that could not be altered by builder's addition of "not full payment" below the condition.

See publication Words and Phrases for other judicial constructions and definitions.

2. Accord and Satisfaction ⇐11(1)

Accord and satisfaction of single claim is not avoided merely because amount paid and accepted is only that which debtor concedes to be due or that debtor's view of controversy is adopted in making settlement.

3. Accord and Satisfaction ⇐11(2)

Where bona fide dispute arose as to amount owing and check was tendered by owner to builder in full payment of unliquidated claim, the builder could not disregard the condition attached to check.

4. Accord and Satisfaction ⇐1

Common-law rules of accord and satisfaction are not altered by U.C.A.1953, 70A-1-207.

B. Ray Zoll, Salt Lake City, for Marton

Peter M. Ennenga, Midvale, for Jensen.

HOWE, Justice:

These appeals are from a judgment entered in an action brought by the plaintiff, Marton Remodeling, to foreclose a mechanic's lien which it had filed against a house and lot owned by the defendant, Mark Jensen, for $6,538.12 which it claimed was due it for remodeling. Judgment was entered on a jury verdict for $1,538, together with $1,000 punitive damages, and attorney fees of $5,950.24. The trial court remitted the award of punitive damages and reduced the attorney fees by 50 percent to $2,976.12. Jensen appeals from that judgment in case No. 18400, and in case No. 18401, Marton appeals, seeking to reinstate the award of punitive damages and recover the full amount of attorney fees awarded by the jury.

Jensen engaged Marton Remodeling in a "time and materials" contract to remodel his house. When Marton presented the final bill for $6,538.12, Jensen contended that the number of hours claimed was excessive. He offered to pay $5,000 because he considered the services were worth that amount, but Marton refused the offer. Nevertheless, Jensen sent Marton a $5,000 check with the following condition placed thereon: "Endorsement hereof constitutes full and final satisfaction of any and all claims payee may have against Mark S. Jensen, or his property, arising from any circumstances existing on the date hereof." Marton wrote a letter to Jensen refusing to accept the check in full payment and demanded the balance. When Jensen made no further payment, Marton filed a mechanic's lien on Jensen's property and cashed the check after writing "not full payment" below the condition. This action was then brought by Marton to recover the $1,538 balance plus punitive damages and attorney fees.

[1] Jensen contends that the trial court erred in refusing to direct a verdict in his favor because, as a matter of law, Marton's cashing of the $5,000 check constituted an accord and satisfaction that could not be altered by the words added to the condition placed thereon by Jensen. We agree.

Viewing the evidence in the light most favorable to Marton Remodeling, there was an accord and satisfaction as we have defined that term in the previous cases decided by this Court. *See Sugarhouse Finance Co. v. Anderson*, Utah, 610 P.2d 1369 (1980); *Tates, Inc. v. Little America Refining Co.*, Utah, 535 P.2d 1228 (1975); *Bennett v. Robinson's Medical Mart, Inc.*, 18 Utah 2d 186, 417 P.2d 761 (1966); *Ralph A. Badger & Co. v. Fidelity Building & Loan Association*, 94 Utah 97, 75 P.2d 669 (1938); *Ashton v. Skeen*, 85 Utah 489, 39 P.2d 1073 (1935).

Marton asserts that there was not an accord and satisfaction because Marton was unquestionably entitled to the $5,000 represented by the check, and the only dispute was whether any further amount was owing. He cites *Bennett v. Robinson's Medical Mart, Inc., supra*, in support of that reasoning. That reliance is misplaced because that case did not involve a single claim as in the instant case. In *Bennett*, a salesman who was paid only commissions on sales made by him was put on a fixed monthly salary by his employer. When he terminated his employment two months later, he demanded payment of his fixed monthly salary then due him plus unpaid commissions on sales allegedly made by him prior to the change. He also sought reimbursement of stock payments. His employer gave him a check for the amount of the fixed monthly salary then due him, which he cashed, bearing the statement that it was "payment in full of the account stated below—endorsement of check by payee is sufficient receipt." This Court viewed the salesman as having two claims: one for his fixed monthly salary which was not in dispute and another claim for his commissions about which there was a dispute. The amount of the check covered only the fixed monthly salary and did not purport to relate to the claim for commissions. We held that the plaintiff's cash-

ing of the check in those circumstances could not constitute an accord and satisfaction of the claim for commissions. We cited *Dillman v. Massey Ferguson, Inc.*, 13 Utah 2d 142, 369 P.2d 296 (1962), which also involved two claims, in support of our decision. The Alaska Supreme Court in *Air Van Lines, Inc. v. Buster*, Alaska, 673 P.2d 774 (1983), held that a single claim, including both its disputed and undisputed elements, is unitary and not subject to division so long as the whole claim is unliquidated.

Marton is not aided by *Allen-Howe Specialties v. U.S. Construction, Inc.*, Utah, 611 P.2d 705 (1980). There, the cashing of a check representing a progress payment on a contract was held not to be an accord and satisfaction of all amounts owing up to that time. At the time the progress payment was made, there was no dispute and, unlike the instant case, it was not tendered as the last payment of the contract where finality and settlement is usually sought and intended.

[2] Thus, neither of those cases is dispositive here where we are confronted with a single unliquidated claim, *viz.*, the balance owing on a "time and materials" contract. Instead, the general rule applies, which is that an accord and satisfaction of a single claim is not avoided merely because the amount paid and accepted is only that which the debtor concedes to be due or that his view of the controversy is adopted in making the settlement. *Air Van Lines, Inc. v. Buster, supra; North American Union v. Montenie*, 68 Colo. 220, 189 P. 16 (1920); *Stanley-Thompson Liquor Co. v. Southern Colorado Mercantile Co.*, 65 Colo. 587, 178 P. 577, 4 A.L.R. 471 (1919); 1 C.J.S. *Accord and Satisfaction* § 32 (1936). Corbin on Contracts § 1289 approves the rule and states that it is supported by the greater number of cases, citing as good examples *Miller v. Prince Street Elevator Co.*, 41 N.M. 330, 68 P.2d 663 (1937), *Treat v. Price*, 47 Neb. 875, 66 N.W. 834 (1896), and *Fuller v. Kemp*, 138 N.Y. 231, 33 N.E. 1034 (1893).

[3] It is of no legal consequence that Marton told Jensen upon receipt of the $5,000 check that he did not regard it as payment in full. Marton could not disregard with immunity the condition placed on the check by Jensen by writing "not full payment" under the condition. It is true that there is not an automatic accord and satisfaction every time a creditor cashes a check bearing a "paid in full" notation. *Smoot v. Checketts*, 41 Utah 211, 125 P. 412 (1912). An accord and satisfaction requires that there be an unliquidated claim or a bona fide dispute over the amount due. *Ashton v. Skeen, supra.* Payment must be tendered in full settlement of the entire dispute and not in satisfaction of a separate undisputed obligation, as in *Bennett v. Robinson's Medical Mart, Inc., supra.* Payment cannot be given merely as a progress payment, as in *Allen-Howe v. U.S. Construction, Inc., supra.* However, when a bona fide dispute arises (the existence of which Marton does not dispute in this appeal) and a check is tendered in full payment of an unliquidated claim as we have here, arising out of a "time and materials" contract, the creditor may not disregard the condition attached. Corbin on Contracts § 1279 explains:

> The fact that the creditor scratches out the words "in full payment," or other similar words indicating that the payment is tendered in full satisfaction, does not prevent his retention of the money from operating as an assent to the discharge. The creditor's action in such case is quite inconsistent with his words. It may, indeed, be clear that he does not in fact assent to the offer made by the debtor, so that there is no actual "meeting of the minds." But this is merely another illustration of the fact that the making of a contract frequently does not require such an actual meeting.

(Footnote omitted.) Restatement (Second) of Contracts § 281 is to the same effect and provides the following illustration:

> 6. A contracts with B to have repairs made on A's house, no price being fixed. B sends A a bill for $1,000. A honestly disputes this amount and sends a letter

> explaining that he thinks the amount excessive and is enclosing a check for $800 as payment in full. B, after reading the letter, indorses the check and deposits it in his bank for collection. B is bound by an accord under which he promises to accept payment of the check in satisfaction of A's debt for repairs. The result is the same if, before indorsing the check, B adds the words "Accepted under protest as part payment." The result would be different, however, if B's claim were liquidated, undisputed and matured.

(Citation omitted.) See *Miller v. Prince Street Elevator Co., supra, Wilmeth v. Lee,* Okla., 316 P.2d 614 (1957), and *Graffam v. Geronda,* Me., 304 A.2d 76 (1973), for cases where it was held that a creditor cannot avoid the consequences of his exercise of dominion by a declaration that he does not assent to the condition attached by the debtor. The last cited case succinctly stated the law to be, "The law gave the plaintiffs the choice of accepting the check on defendant's terms or of returning it."

[4] Marton contends that under U.C.A., 1953, § 70A-1-207, it avoided the condition placed on the check by Jensen when it added the words "not full payment." Marton asserts that those were words of reservation of rights recognized by section 70A-1-207. Without deciding whether the wording added by Marton could be so interpreted, no authority is cited by Marton that section 70A-1-207 applies to a "full payment" check. Of the authorities which we have found, the better reasoned hold that our section 70A-1-207 (which is identical to section 1-207 of the Uniform Commercial Code) does not alter the common law rules of accord and satisfaction. *See Flambeau Products Corp. v. Honeywell Information Systems, Inc.,* 116 Wis.2d 95, 341 N.W.2d 655 (1984); *R.A. Reither Construction, Inc. v. Wheatland Rural Electric Association,* Colo.App., 680 P.2d 1342 (1984); *Stultz Electric Works v. Marine Hydraulic Engineering Co.,* Me., 484 A.2d 1008 (1984); *Air Van Lines, Inc. v. Buster, supra; Les Schwab Tire Centers of Oregon, Inc. v. Ivory Ranch, Inc.,* 63 Or.App. 364, 664 P.2d 419 (1983); *Connecticut Printers, Inc. v. Gus Kroesen, Inc.,* 134 Cal.App.3d 54, 184 Cal.Rptr. 436 (1982); *Milgram Food Stores, Inc. v. Gelco Corp.,* 550 F.Supp. 992 (W.D.Mo.1982); *Pillow v. Thermogas Co. of Walnut Ridge,* 6 Ark. App. 402, 644 S.W.2d 292 (1982); *Eder v. Yvette B. Gervey Interiors, Inc.,* Fla.App., 407 So.2d 312 (1981); *Chancellor, Inc. v. Hamilton Appliance Co.,* 175 N.J.Super. 345, 418 A.2d 1326 (1980); *Brown v. Coastal Trucking, Inc.,* 44 N.C.App. 454, 261 S.E.2d 266 (1980); *State Department of Fisheries v. J-Z Sales Corp.,* 25 Wash.App. 671, 610 P.2d 390 (1980); and *Jahn v. Burns,* Wyo., 593 P.2d 828 (1979) (noted with approval in *Recent Developments in Utah Law,* 1980 Utah L.Rev. 649, 710); Rosenthal, *Discord and Dissatisfaction: Section 1-207 of the Uniform Commercial Code,* 78 Colum.L.Rev. 48 (1978)). Several courts have stated that if they were to construe the statute to limit accord and satisfaction, it would jeopardize a convenient and valuable means of achieving informal settlements. *Les Schwab Tire Centers of Oregon, Inc. v. Ivory Ranch, Inc., supra.* The law favors compromise in order to limit litigation. Accord and satisfaction serves this goal. *Air Van Lines, Inc. v. Buster, supra.* As stated by Judge Corbin in *Pillow v. Thermogas Co. of Walnut Ridge, supra,* "If we were to decide that a creditor can reserve his rights on a 'payment in full' check, it would seriously circumvent what has been universally accepted in the business community as a convenient means for the resolution of disagreements."

Our determination that there was an accord and satisfaction obviates the necessity of our consideration of any of the other points raised in either appeal. The judgment in favor of the plaintiff is reversed, and the case is remanded to the trial court to enter judgment in favor of the defendant. Costs on appeal are awarded to defendant.

HALL, C.J., and DURHAM, J., concur.

STEWART, J., dissents.

ZIMMERMAN, J., does not participate herein.

F. Cove View Excavating and Construction Co. v. Flynn, 758 P.2d 474 (Utah App. 1988)

COVE VIEW EXCAVATING AND CONSTRUCTION CO., Plaintiff and Respondent,

v.

D. Thomas FLYNN and D. Thomas Flynn Construction, Inc., Defendants and Appellants.

No. 870180–CA.

Court of Appeals of Utah.

July 28, 1988.

Creditor brought action against debtor to recover an unpaid balance of amount due on labor and materials supplied by creditor. The Tenth Circuit Court, Sevier County, Don V. Tibbs, J., entered judgment against debtor, and debtor appealed. The Court of Appeals, Jackson, J., held that: (1) creditor's negotiation of debtor's check, which contained handwritten restriction that payment was in full for all labor and materials owed creditor, resulted in accord and satisfaction as matter of law, although debtor crossed out restrictive language on check before negotiating it, and (2) finding that debtor's tender of check containing handwritten restriction was payment on ongoing account or progress payment was improper.

Reversed and remanded with directions.

1. **Accord and Satisfaction ⇐4, 26(1)**

Elements essential to contracts generally must be present in accord and satisfaction, including offer and acceptance, and meeting of minds; burden of proving every necessary element is on party claiming accord and satisfaction.

2. **Accord and Satisfaction ⇐11(2)**

There is no automatic accord and satisfaction every time creditor cashes debtor's check bearing paid-in-full notation or some equivalent language; there must also be unliquidated claim or bona fide dispute over liquidated amount due creditor.

3. **Appeal and Error ⇐1008.1(5)**

Finding of fact is clearly erroneous if it is without adequate evidentiary foundation or if it is induced by erroneous view of law. Rules Civ.Proc., Rule 52(a).

4. **Appeal and Error ⇐1008.1(5), 1012.1(4)**

Reviewing court will not set aside trial court's findings unless they are against clear weight of evidence or reviewing court otherwise reaches definite and firm conviction that mistake has been made.

5. **Appeal and Error ⇐842(2)**

Conclusions of law are reviewed on appeal for correctness without any deference to trial court.

6. **Accord and Satisfaction ⇐11(2)**

Restrictive language on debtor's check to creditor is one evidentiary fact to be considered with other evidence, if any, in making factual determination of whether creditor knew or should have known that debtor's payment was tendered as full satisfaction of identified obligation.

7. **Accord and Satisfaction ⇐11(3)**

Creditor's negotiation of debtor's check, which contained handwritten restriction that payment was in full for all labor and materials owed creditor, resulted in accord and satisfaction as matter of law, although creditor crossed out restrictive language on check before negotiating it; restrictive language on check was clear and definite offer to settle entire account with creditor, creditor admitted that debtor attempted to present check to satisfy in full claims of creditor, creditor knew or reasonably should have known from language on check that debtor disputed creditor's computation of amount due and was making offer of accord and satisfaction, and fact that creditor did not subjectively intend to accept check as full payment of debtor's obligation was legally irrelevant.

8. **Accord and Satisfaction ⇐26(3)**

Finding that debtor's tender of check, which contained handwritten restriction that payment was in full for all labor and materials owed creditor, was payment on ongoing account or progress payment and not offer of accord and satisfaction was improper; contract between debtor and creditor was not for fixed sum, and creditor did not reject tender of final and full payment under contract.

John Burton Anderson, Kevin Olsen (argued), Salt Lake City, for defendants and appellants.

Marcus Taylor, Richfield, for plaintiff and respondent.

Before BENCH, JACKSON and BILLINGS, JJ.

OPINION

JACKSON, Judge:

D. Thomas Flynn Construction, Inc. and D. Thomas Flynn ("Flynn") appeal from the $1,517.50 circuit court judgment entered against them pursuant to an oral agreement for the purchase of construction materials and the rental of a pump and a backhoe. We reverse the judgment and remand the case to the trial court for entry of judgment in appellants' favor.

In the spring of 1984, Flynn talked to Charles Wayne Grundy ("Grundy"), president of respondent Cove View Excavating and Construction Company ("Cove View"), about a few days' use of Grundy's large backhoe. Flynn needed the equipment to complete excavation work he was performing on a highway project. The agreed rental charge was $125 per hour, but no specif-

ic number of hours was set. With Grundy as its operator, the backhoe was put to work on the job site from May 7 through May 15. A large pump Flynn eventually needed because of unexpected water problems on the job was also rented from Grundy at an orally agreed-upon $35 daily charge, with no specific number of days set.

On May 25, Grundy sent an invoice to Flynn for $5,922.50, including 41.5 hours for backhoe rental on May 7, 8, 9, 10 and 15, seventeen days of pump rental from May 8 through May 25, and $140 for purchased construction materials. Flynn disagreed with the number of hours billed for the backhoe and the number of days billed for the pump, which was removed from the job site on June 14. According to his time records, he only owed Grundy a total of $4,060 for materials, pump rental, and backhoe rental through June 26. On that day, he sent to Cove View a check for $5,000 with the following handwritten notation on the front of the check: "pmt in full to date labor & materials." In addition, the back of the check contained a handwritten restriction: "payment in full for all labor and materials to 6/26/84."

On June 27, before receiving the check, Grundy sent a second invoice to Flynn that included the overdue May invoice amount plus twenty more days of pump rental (from May 26 through June 14) and pump repair costs, for a total of $6,724.56. No additional hours were billed for backhoe rental. On the advice of counsel, Grundy crossed out the restrictive language on the back of the check and negotiated it. He thereafter billed Flynn for the unpaid $1,724.56 balance and eventually filed this suit.

At the bench trial, Flynn produced his daily records showing fewer hours of usage than claimed by Grundy in his billings. Flynn asserted they had agreed he would be charged only for the time the backhoe was actually *in use*, as opposed to *on the job*. He also claimed the rental of the pump was only for the days of actual use, i.e., through May 25, not all the days he had it in his possession. Grundy contradicted this and testified his billings were compiled from his memory and from the daily journals in which he recorded how many hours the backhoe was on the job. According to him, they had agreed Flynn was to be billed for the number of days he had the pump. The trial court resolved these disputed factual matters in favor of Cove View, disallowing only the pump repair costs and three days of pump rental charges when the pump was broken.

[1] In support of their motion for summary judgment at the close of respondent's evidence, later denied, appellants had argued they were entitled to judgment as a matter of law because, under *Marton Remodeling v. Jensen*, 706 P.2d 607 (Utah 1985), the parties had reached an accord and satisfaction of Cove View's claim. An accord and satisfaction arises when the parties to a contract agree that a different performance, offered in substitution of the originally agreed-upon performance, will discharge the obligation created under the original agreement. *Golden Key Realty, Inc. v. Mantas*, 699 P.2d 730, 732 (Utah 1985); *Brimley v. Gasser*, 754 P.2d 97, 98 (Utah App.1988). The elements essential to contracts generally must be present in an accord and satisfaction, including an offer and acceptance and a meeting of the minds. *Spor v. Crested Butte Silver Mining, Inc.*, 740 P.2d 1304, 1308 (Utah 1987). The burden of proving every necessary element is on the party claiming an accord and satisfaction. *Bench v. Bechtel Civil & Minerals, Inc.*, 758 P.2d 460, 461 (Utah App. 1988).

[2] As the court pointed out in *Marton Remodeling*, there is not an automatic accord and satisfaction every time a creditor cashes a debtor's check bearing a "paid in full" notation or some equivalent language. *Marton Remodeling*, 706 P.2d at 609 (citing *Smoot v. Checketts*, 41 Utah 211, 125 P. 412 (1912)). There must also be an unliquidated claim or a bona fide dispute over the liquidated amount due the creditor. *Id.* In such cases, there is sufficient consideration to support the accord and satisfaction because the person's tender of the check on condition that it be accepted

as full payment constitutes a surrender of the right to dispute the initial obligation. *See Sugarhouse Fin. Co. v. Anderson*, 610 P.2d 1369, 1372 (Utah 1980).[1] Because there must be an unliquidated or disputed claim, it follows that the obligor's tendered payment cannot be given merely as a "progress payment" on an indivisible contract for a liquidated amount, as in *Allen-Howe Specialties v. U.S. Constr., Inc.*, 611 P.2d 705 (Utah 1980). *See Marton Remodeling*, 706 P.2d at 609.

In his oral ruling from the bench after appellants had put on their case, the trial judge gave two reasons for rejecting Flynn's defense that an accord and satisfaction of the disputed rental charges had taken place when Grundy cashed the June 26 check. First, the court expressed its view that it was not "fair" or "proper" for Flynn to raise a dispute regarding the hours billed by merely sending the check with restrictive language the court concluded had "no effect." Second, the trial court characterized the June 26 check as payment on an "ongoing account" because Flynn still had the pump after the first billing was sent.

Respondent's counsel subsequently drafted the sparse written findings and conclusions in which neither of these two reasons is mentioned. Instead, the conclusion was that no accord and satisfaction had been reached solely because, despite the restrictive language on the check, Grundy had intended to accept the check as partial payment of the first invoice, not as full payment of Flynn's entire bill.

[3–5] Under the standard of review set forth in Utah R.Civ.P. 52(a), a finding of fact is clearly erroneous if it is without adequate evidentiary foundation or if it is induced by an erroneous view of the law. *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). We will not set aside the trial court's findings unless they are against the clear weight of the evidence or we otherwise reach a definite and firm conviction that a mistake has been made. *Western Kane County Special Serv. Distr. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1377 (Utah 1987). Conclusions of law, however, are simply reviewed on appeal for correctness without any deference to the trial court. *Id.* at 1378.

On appeal, appellants assert: (1) the evidence does not support the findings that the claim at issue here was undisputed and that Flynn's payment was on an ongoing account; and (2) the trial court erroneously interpreted and applied the law of accord and satisfaction. They contend the limitation on the check was itself a clear indication of dispute and an offer of full payment of Flynn's account through June 26—for less than the amount Grundy claimed was due through that date—which Grundy accepted by cashing the check, notwithstanding his actual intent. We agree.

The trial court apparently determined this was not a disputed claim because there were no discussions or correspondence to that effect between the parties prior to or contemporaneous with the check itself. However, there is no legal support for the proposition that restrictive language on the tendered check is alone insufficient to create the dispute required for an accord and satisfaction. In *Hintze v. Seaich*, 20 Utah 2d 275, 437 P.2d 202, 207 (1968), the Utah Supreme Court suggested that restrictive wording accompanying a tender of full payment could be a sufficient expression of the debtor's intention that it only be accepted as full payment of the pending claim.

[6] The restrictive language is merely one evidentiary fact to be considered with other evidence, if any, in making the factual determination of whether the creditor knew or should have known that the payment was tendered as full satisfaction of an identified obligation of the debtor. 6 A. Corbin, *Corbin on Contracts* § 1277 (1962). *See Rivervalley Co. v. Deposit Guaranty Nat'l Bank*, 331 F.Supp. 698, 708–09 (N.D.Miss.1971) (applying Mississip-

1. Where, however, the underlying claim is liquidated and certain as to amount, separate consideration must be found to support the accord; otherwise, the obligor binds himself to do nothing he was not already obligated to do, and the obligee's promise to accept a substitute performance is unenforceable. *Sugarhouse Fin. Co.*, 610 P.2d at 1372.

pi law). *See generally* Annotation, *Accord and Satisfaction—Check Acceptance*, 42 A.L.R.4th 12 (1985).

[7] Despite the fact that Flynn had not yet received Cove View's second invoice when he sent the check, the language on the front and back is a clear and definite offer to settle his entire account through June 26 for less than Cove View was claiming as due through that date. This open-ended, oral equipment rental agreement for unspecified total time periods was—by its very nature—likely to lead to differing tallies of the hours and days to be billed. Flynn did not have possession of Cove View's equipment after June 15. The June 26 check was for almost $1,000 less than what Cove View claimed on its first invoice. Grundy did not contend he misunderstood Flynn's intent in sending the check or the meaning of the limiting words. Indeed, during pretrial discovery he admitted that "Defendants attempted to present said check to satisfy in full the claims of Plaintiff...." Grundy did not just take the check and deposit it without concern for the notations on it. He waited and sought the advice of his attorney, who told him to cross out the restrictive endorsement and negotiate the check. Grundy knew or reasonably should have known—from the nature of the rental agreement itself and from the language on the check—that Flynn disputed Cove View's computation of the total number of hours of equipment rental and was making an offer of accord and satisfaction. The trial court's finding to the contrary is clearly erroneous.

In light of the express condition on the check, the fact that Grundy did not subjectively intend to accept the check as full payment of Flynn's obligation is legally irrelevant. A creditor may not disregard the condition attached to a check tendered in full payment of an unliquidated or disputed claim. *Marton Remodeling*, 706 P.2d at 609.[2] Grundy's options were to accept the check on Flynn's terms or return it. *See id.* at 610. *See also Air Van Lines, Inc. v. Buster*, 673 P.2d 774, 778 (Alaska 1983); *Graffam v. Geronda*, 304 A.2d 76, 80 (Me.1973). His negotiation of Flynn's check was an acceptance of Flynn's offer of full payment, notwithstanding his lack of any actual intent to accept it as such.

> The fact that the creditor scratches out the words "in full payment," or other similar words indicating that the payment is tendered in full satisfaction, does not prevent his retention of the money from operating as an assent to the discharge.... It may, indeed, be clear that he does not in fact assent to the offer made by the debtor, so that there is no actual "meeting of the minds." But this is merely another illustration of the fact that the making of a contract frequently does not require such an actual meeting.

6 A. Corbin, *Corbin on Contracts* § 1279 (1962) (quoted with approval in *Marton Remodeling*, 706 P.2d at 609). *See Spor*, 740 P.2d at 1308 (acceptance of an offer to rescind a contract may be inferred from a party's conduct). The trial court thus incorrectly concluded that respondent could cross out and thereby vitiate the restrictions on Flynn's check.

In explaining from the bench his ruling that there was no accord and satisfaction, the trial judge stated this was an "ongoing account," the significance of which is not set forth. For reasons that are not apparent in the record, this finding does not reappear in the written findings of fact and conclusions of law. It could be construed as another way of saying, as the written findings and conclusions suggest, that Grundy accepted the check only with the actual intent to apply it as partial payment of Flynn's bill. However, Grundy's negotiation of this check resulted in an accord and satisfaction as a matter of law regardless of his subjective intent.

2. *See Pino v. Lopez*, 361 So.2d 192 (Fla.App. 1978) (accord and satisfaction found where creditor accepted check with notation "Full and final payment for all goods, services and claims to date"), *cert. dismissed*, 365 So.2d 714 (Fla. 1978); *Young v. Proctor*, 119 Ga.App. 165, 166 S.E.2d 428 (1969) (restrictive endorsement for "all bookkeeping & accounting services to date"); *Graffam v. Geronda*, 304 A.2d 76 (Me. 1973) ("Full and final payment for product received December 18, 1969").

[8] On the other hand, a careful reading of the trial transcript (particularly the legal arguments of respondent's counsel) strongly suggests that, by finding an ongoing account, the court was equating Flynn's check with the "progress payment" in *Allen-Howe Specialties*, 611 P.2d at 710. As such, it is clearly erroneous.

In *Allen-Howe Specialties*, the parties entered into an indivisible written construction contract for a liquidated amount, i.e., $53,372. In accordance with its terms, the defendant made regular partial payments to the plaintiff as work progressed. Restrictive language on the back of each check stated its endorsement acknowledged payment in full for all labor, equipment and materials furnished to date by the payee. Plaintiff refused the tender of the last payment under the contract and filed suit to recover sums, in addition to those in the written contract, for extra work performed. The court rejected defendant's argument that negotiation of the progress payment checks constituted an accord and satisfaction of all claims for extra work incurred during the time periods for which the accepted progress payments were made. *Id.* at 710–11.

In marked contrast, the contract between Flynn and Cove View was not for a fixed sum. It was for an undetermined number of hours and days of rental that were undisputedly over when Flynn sent his check; the parties simply disagreed over the total amount to be paid. Unlike the plaintiff in *Allen-Howe Specialties*, Grundy did not reject the tender of final and full payment under the contract. Instead, he accepted a check with an express condition that it was offered as "payment in full for all labor and materials to 6/26/84," resulting in an accord and satisfaction of all Cove View's claims through that date.

The judgment of the trial court is reversed and the case is remanded for entry of judgment in appellants' favor. Costs to appellants.

BILLINGS and BENCH, JJ., concur.